

1 RANDOLPH C. VISSER (State Bar No. 64689)
2 MARTIN "KELLY" J. McTIGUE (State Bar No. 150854)
3 LILIT GARIBYAN (State Bar No. 208801)
4 MORGAN, LEWIS & BOCKIUS LLP
5 300 South Grand Avenue
6 Twenty-Second Floor
7 Los Angeles, California 90071-3132
8 Tel: 213.612.2500
9 Fax: 213.612.2501

10 Attorneys for Petitioner
11 OLIN CORPORATION

12 **BEFORE THE CALIFORNIA**
13 **STATE WATER RESOURCES CONTROL BOARD**

14 In the Matter of

15 OLIN CORPORATION,

16 Petitioner,

CASE NO. _____

OLIN CORPORATION'S PETITION FOR
REVIEW OF CLEANUP AND ABATEMENT
ORDER NO. R4-2004-0101 AND REQUESTS
FOR STAY, HEARING (ORAL ARGUMENT)
AND LEAVE TO PRESENT SUPPLEMENTAL
EVIDENCE (EXPERT OPINION AND PUBLIC
DOCUMENTS)

[Water Code § 13320; 22 C.C.R. § 2050, *et seq.*]

17 **TO THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD:**

18 **I. INTRODUCTION**

19 Petitioner Olin Corporation ("Olin") respectfully petitions the State Water Resources
20 Control Board ("State Board") for review of Cleanup and Abatement Order No. R4-2004-0101
21 issued by the Regional Water Quality Control Board, Central Coast Region ("Regional Board")
22 on July 6, 2004 ("CAO"). Olin additionally requests an immediate stay, a hearing for oral
23 argument and leave to present supplemental evidence, i.e., expert opinion declaration and public
24 documents.

25 On June 4, 2004, the State Water Resources Control Board ("State Board") held that the
26 Regional Board's recent "direction" to Olin Corporation ("Olin") to continue to provide interim,
27 uninterrupted replacement water, i.e., bottled water, to all affected well owners with well
28

1 perchlorate concentrations at 4 ppb or higher in accordance with a prior Water Code § 13267
2 Order, despite California's issuance of a formal, final perchlorate Public Health Goal (PHG) and
3 revised Action Level of 6 ppb perchlorate PHG, did not constitute a final action and, thus, was
4 not reviewable. The State Board advised, however, that: "Should the Regional Board issue a
5 [Water Code § 13304] cleanup and abatement order with this requirement, a petition would be
6 appropriate."

7 On July 6, 2004, the Regional Board issued such a Water Code § 13304 Order for both
8 interim and long term replacement water to domestic well owners, again refusing to conform the
9 replacement water level to the final California 6 ppb PHG and current 6 ppb Action Level rather
10 than the prior action level of 4 ppb. The Regional Board also required in the CAO that Olin
11 supply replacement water to wells which have sampled perchlorate concentrations below 4 ppb
12 until four consecutive quarters of samples confirm perchlorate is below the CAO's 4 ppb
13 compliance level. Moreover, the Regional Board prematurely imposed long term replacement
14 water requirements at the same 4 ppb level (1) prior to determining (or even allowing Olin to
15 present evidence on) the appropriate final groundwater aquifer restoration cleanup standard ("GW
16 Aquifer Cleanup Standard"); and, (2) prior to California's issuance of an enforceable perchlorate
17 drinking water maximum contaminant level (MCL). Finally, the Regional Board imposed both
18 interim and long term replacement water requirements prior to, and without requesting from Olin,
19 a replacement water plan as expressly required by Water Code § 13304 ("Replacement Water
20 Plan"). In taking these actions, the Regional Board abused its discretion by improperly and
21 inappropriately: (1) substituting its subjective judgment, without a reasonable factual basis, for
22 California's official, solely health-based safe drinking water PHG decision; (2) unreasonably
23 imposing long term water replacement requirements based on a presumed background GW
24 Aquifer Cleanup Standard, when an actual GW Aquifer Cleanup Standard has yet to be
25 determined and prior to California's issuance of a final perchlorate MCL; and, (3) failing to
26 proceed as required by statutory and regulatory law.

27 The Regional Board's CAO here adversely impacts Olin and its site remediation efforts in
28 a serious and substantial manner, including forcing Olin: (1) to unnecessarily spend over

1 \$782,000/year to replace safe drinking well water with bottled water; and, (2) to unnecessarily
2 provide and implement costly long term and permanent well water treatment at the 4 ppb to 6 ppb
3 level estimated to cost in the range of \$3.6- \$4.1 million, which is likely to prove unnecessary in
4 the near future when a GW Aquifer Cleanup Standard and perchlorate MCL are determined, and
5 the appropriate final GW Aquifer remediation is implemented.

6 Moreover, this Petition raises substantial issues of first impression and precedential
7 importance as to the appropriate regional board supervision and management of perchlorate
8 contaminated groundwater cases, a significant Statewide issue requiring the highest level of
9 review and guidance by the State Board to ensure fairness and equity to all involved parties and
10 consistent practices and procedures by Regional Boards across all regions. Conflict already exists
11 as, in May 2004, the San Francisco Regional Board set a 6 ppb perchlorate GW Aquifer Cleanup
12 Standard (pending issuance of an MCL) at the United Technologies site in Santa Clara County
13 (including the Anderson drinking water reservoir), upgradient from the Olin/Standard Fusee Site.
14 The United Technologies site is just 14 miles north of the Olin Site.

15 Importantly, the CAO to Olin here is also the first known case involving a Regional
16 Board's issuance of a CAO under newly amended Water Code § 13304. This is also the first case
17 requiring a party to provide both interim and long term replacement water supplies and to replace
18 existing well water already meeting a California final and exclusively health-based PHG and
19 current Action Level. The Regional Board has done this, before even setting a final GW Aquifer
20 Cleanup Standard and before the issuance of the expected California perchlorate MCL governing
21 future remediation and without first requesting a replacement water plan as required by statute.

22 **II. SUMMARY OF PETITION**

23 By this petition, Olin seeks review of the Regional Board's July 6, 2004 CAO which
24 requires Olin to: supply "uninterrupted replacement water service" to owners of wells with
25 detectable perchlorate concentrations. The CAO is two-pronged, imposing both interim and long
26 term replacement water obligations.

27 First, "[e]ffective immediately," the CAO requires Olin to provide interim, uninterrupted
28 replacement water service, i.e., bottled water, for all domestic wells in which perchlorate has been

1 detected both at concentrations above and below 4 ppb, until Olin can demonstrate, and the
2 Regional Board concurs, that there are four consecutive quarters of sampling data below 4 ppb
3 (with additional well monitoring requirements for a three-year period thereafter) ("Interim Water
4 Replacement Requirements").

5 Second, the CAO requires Olin to provide long term, uninterrupted water service, i.e.,
6 bottled water or well water treatment, for wells between 4 and 9.9 ppb (after submittal of a
7 detailed implementation work plan) and for wells at or over 10 ppb (after submittal of an
8 implementation time schedule) ("Long Term Replacement Water Requirements"). The Regional
9 Board does not request in the CAO that Olin provide the Water Code § 13304 statutorily-required
10 Replacement Water Plan, and admits that "the work plans and monitoring required by this Order
11 are necessary to design a [Water Code §13304] water replacement plan and implementation
12 schedule..." [CAO (emphasis added); Declaration of Randolph C. Visser ("Visser Decl."),
13 Exh. A, p. 9.]

14 The background to the present CAO which continues pre-existing Regional Board
15 "directions," if not enforceable order requirements as held by the State Board, is critically
16 important. On October 18, 2002, the Regional Board issued an order pursuant to Water Code
17 § 13267 (the "October 18, 2002 Order") requesting certain well monitoring and reports as well as
18 directing Olin to provide "treatment or an alternative water supply," e.g., bottled water, to all
19 owners (and their tenants) of domestic water wells in which perchlorate concentrations exceeded
20 the then-prevailing "4ug/l [i.e., 4 ppb] action level" established by the California Department of
21 Health Services (DHS). The Regional Board based the October 18, 2002 Order and alternative
22 water supply requirement on the fact and finding that:

23 *"An action level is the level of contaminant in drinking water that is*
24 *considered safe to people ingesting the water on a daily basis."*
[Visser Decl., Exh. E, p. 18 (emphasis added).]

25 Thus, the Regional Board based its original and first "direction" to supply replacement water
26 solely on the prevailing DHS Action Level, which at that time was 4 ppb. In substance and
27 effect, the Regional Board deferred to, adopted and incorporated into its October 18, 2002 Order
28 the DHS Action Level (which at that time was 4 ppb) as its applicable provisional standard for

1 determining the safe perchlorate level in drinking water for purposes of requiring Olin to provide
2 interim replacement water at that level prior to issuance of a final MCL. Moreover, numerous
3 subsequent Regional Board actions corroborate that the Regional Board intended, correctly, that
4 the California Action Level be the applicable provisional interim water replacement standard until
5 a final MCL-based cleanup standard is set. The Regional Board's adoption of the Action Level is
6 consistent with its past practice in other cases (and other regional board practices) as the Action
7 Level is the governing most conservative, health-protective drinking water standard until an
8 enforceable MCL is issued.

9 On March 12, 2004, after lengthy and extensive public and regulatory hearings and
10 rigorous review and evaluation, California's Office of Environmental Health Hazard Assessment
11 (the agency statutorily charged with authority over chemical toxicological risk assessments and
12 PHGs; "OEHHA") issued its formal and final perchlorate PHG of 6 ppb. California's PHG is the
13 exclusively health-based drinking water goal established by OEHHA without regard to
14 technology or cost impacts, as a concentration of perchlorate in drinking water that poses no
15 significant health risk to individuals, including sensitive populations, e.g., infants, pregnant
16 women and their fetuses, consuming the water on a daily basis over a lifetime. [Visser Decl.,
17 Exh. K, pp. 50-51.] On the same day OEHHA established its 6 ppb PHG, DHS (the agency
18 statutorily charged with authority over drinking water standards and well water protections)
19 immediately revised its perchlorate Action Level from 4 ppb to 6 ppb to conform to the PHG and
20 initiated the requisite regulatory process to determine a drinking water MCL. [Visser Decl.,
21 Exh. N, p. 170.] On April 7, 2004, Olin formally requested the Regional Board to modify its
22 October 18, 2002 Order to also conform to the revised DHS Action Level and OEHHA PHG of 6
23 ppb. [Visser Decl., Exh. D, p. 17.] The DHS's issuance of a revised Action Level based on the
24 newly established PHG required the Regional Board to make a conforming change to the interim
25 well perchlorate level triggering Olin's water replacement requirements (pending issuance of an
26 MCL). As a PHG/Action Level is, under California law, the most conservative and protective
27 drinking water standard, as it is strictly health-based (even more so than an MCL which must be
28 set only as close as technically and economically feasible), there was no factual, scientific or legal

1 basis for the Regional Board not to do so for purposes of provisional or interim replacement water
2 requirements.

3 On April 29, 2004, the Regional Board denied Olin's formal request to modify the
4 alternative water supply standard from 4 ppb to 6 ppb to conform to the perchlorate Action Level.
5 The Regional Board neither disputed having based its original replacement water requirements on
6 the DHS Action Level nor provided a reasonable factual basis for its refusal to make the
7 conforming change, now that the final PHG-based Action Level had been established. Therefore,
8 on May 28, 2004, Olin petitioned the State Board for review of the Regional Board's April 29,
9 2004 denial of Olin's request for a modification. By its June 4, 2004 letter, the State Board held
10 that, as the Regional Board's water replacement "directions" to Olin were pursuant to Water Code
11 § 13267 (and not § 13304), the Regional Board's action was not final and, thus, was not
12 reviewable by the State Board. The State Board advised, however, that, "[s]hould the Regional
13 Board issue a cleanup and abatement order with this requirement, a petition would be
14 appropriate." [Visser Decl., Exh. B, p. 12.]

15 On July 6, 2004, apparently in response to the State Board's June 4, 2004 decision finding
16 that the Regional Board had not issued an enforceable water replacement order, the Regional
17 Board issued CAO R4-2004-0101 imposing both Interim and Long Term Replacement Water
18 Requirements as described above. In its CAO, now currently issued pursuant to Water Code
19 § 13304, the Regional Board disregards the prior original and sole basis for its water replacement
20 requirements, i.e., the DHS Action Level, but provides no new or reasonable factual basis for
21 failing to conform the water replacement standard to the DHS Action Level, the drinking water
22 level earlier deemed by the Regional Board itself (when not in dispute) to be "safe to people
23 ingesting that water on a daily basis." In its CAO, the Regional Board merely attempts to provide
24 *post hoc* justifications and rationalizations for choosing to be "conservative", for now, and
25 substituting its own subjective judgment to "effectively over-rule" OEHHA's PHG and DHS'
26 Action Level decisions. Given the background, it is evident that the Regional Board's true reason
27 for imposing the 4 ppb level as the touchstone of its CAO is to avoid local citizen controversy
28 should it instead follow the effective 6 ppb standard. Decisions regarding appropriate regulatory

1 levels for drinking water must be based on law, sound science, policy and reason, not feared
2 public or political controversy. The Regional Board's CAO decisions here are without reasonable
3 factual basis and not in accordance with law. Thus, Olin petitions the State Board to vacate the
4 Regional Board's CAO, and additionally requests an immediate stay and leave to present
5 supplemental evidence.

6 **III. PETITION FOR REVIEW OF REGIONAL BOARD'S JULY 6, 2004 CLEANUP**
7 **AND ABATEMENT ORDER**

8 **A. OLIN CORPORATION**

9 Petitioner Olin Corporation owns the 13-acre property located at 425 Tennant Avenue,
10 Morgan Hill, California ("Site"). The Site and off-Site aquifer is located in the Pajaro River
11 Hydrologic Unit, South Santa Clara Valley Area Boundary, Llagas Sub-Basin of the Central
12 Coast Basin. The Site is presently fenced and vacant except for the on-Site remediation activities
13 and equipment. [Declaration of Richard McClure ("McClure Decl."), ¶ 5.]

14 Olin operated a facility at the Site that at various times from 1956 to 1988 was used to
15 manufacture and package a variety of products, e.g., signal flares for highway, marine and
16 railway applications, clay targets and pool supplies. [McClure Decl., ¶ 3.] In 1988, Standard
17 Fusee, an unrelated company, acquired Olin's signal flare business and operated the Site under
18 lease from 1988 through 1996, at which time Standard Fusee formally closed the facility in
19 accordance with Santa Clara County Central Fire Department procedures. Subsequently, in 1997-
20 1998, Olin razed all buildings at the Site to prepare the property for redevelopment. [McClure
21 Decl., ¶ 4.] Olin complied with all applicable environmental, health, safety and other laws during
22 its tenure at the Site.

23 **B. SITE INVESTIGATION**

24 In August 2000, in the course of a due diligence investigation conducted as part of the
25 process to sell the property, Olin first discovered and reported to the California Office of
26 Emergency Services (OES) and Santa Clara County Environmental Health Department (Santa
27 Clara EHD) the detection of perchlorate in soil and groundwater. Since February, 2001, under
28 the supervision of and in cooperation with the Regional Board, Olin has undertaken an extensive

1 investigation of the nature and extent of perchlorate in on-Site soil and groundwater and in off-
2 Site groundwater, has implemented an on-Site ion exchange perchlorate removal and treatment
3 system, and has installed three ion exchange perchlorate removal systems at the West San Martin
4 Water Works and San Martin County Water District water supply wells. Olin has also funded a
5 replacement well for the City of Morgan Hill Tennant Avenue well. [McClure Decl., ¶ 6.]

6 Olin's extensive on-Site and off-Site groundwater investigation and monitoring detected
7 perchlorate downgradient of the Site in the Santa Clara Valley and into an area east of Gilroy. In
8 December 2003, Olin implemented on-Site perchlorate source removal and remediation through
9 construction of an on-Site groundwater containment and treatment system to prevent any further
10 off-Site migration of perchlorate. Olin has submitted a work plan to excavate perchlorate-
11 containing soils to the residential Preliminary Remedial Goal of 7800 mg/kg and for *in situ*
12 bioremediation of over 100,000 square feet of soil to further protect the groundwater resources in
13 the Santa Clara Valley. [McClure Decl., ¶ 7.] Olin's investigation, monitoring and remedial
14 costs to date are approximately \$9,126,000 (excluding the cost of providing alternative bottled
15 water to off-Site well owners beyond the reach of the installed treatment systems). [McClure
16 Decl., ¶ 8.] Olin presently expects to complete the off-Site groundwater investigation and
17 characterization phase of its remediation effort by close of 2005, followed by remediation
18 feasibility and risk assessment studies leading to preparation and submittal of a Remedial Action
19 Plan (RAP) and cleanup implementation. [McClure Decl., ¶ 9.]

20 At the present time, there are 768 off-Site wells with reported detections of perchlorate at
21 or above the perchlorate Method Detection Limit¹ ("MDL") of 2 ppb and, therefore, subject to the
22 CAO's water replacement requirements. Of these 768 off-Site wells, when last tested, 275 wells
23 had perchlorate concentrations between 2-3.99 ppb, 291 wells between 4-5.99 ppb, 189 wells
24 between 6-9.99 ppb and 13 wells greater than 10 ppb. Therefore, 566 wells (almost three-fourths
25 of the total off-Site wells) below the current 6 ppb PHG and Action Level are subject to the

26
27 ¹ The method detection limit (MDL) is defined as the minimum concentration of a substance that can be
28 measured and reported with 99% confidence that the analyte concentration is greater than zero. 40 CFR, Ch. 1,
Pt. 1, 36 Appendix B.

1 CAO's water replacement requirements. [McClure Decl., ¶ 10.] For clarity and convenience, the
2 number of wells, perchlorate concentration ranges and applicable CAO requirements are set forth
3 in the following chart.

| PERCHLORATE CONCENTRATION RANGE | NO. OF WELLS | APPLICABLE CAO REQUIREMENTS |
|------------------------------------|--------------|--|
| greater than 10 ppb | 13 | Interim bottled water and monitoring. Long term replacement water (after submittal of time schedule). CAO, ¶¶ 5 & 6. |
| 6-9.99 ppb | 189 | Interim bottled water and monitoring. Long term replacement water (after submittal of implementation work plan). CAO, ¶¶ 1, 3, 4 & 6. |
| 4-5.99 ppb | 291 | Interim bottled water and monitoring. Long term replacement water (after submittal of implementation work plan). CAO, ¶¶ 1, 3, 4 & 6. |
| 2-3.99 ppb | 275 | Interim bottled water and monitoring. CAO, ¶¶ 2 & 6. |
| Non-detect (below 2 ppb MDL) | 467 | None if sampling confirms non-detect |

14 C. REPLACEMENT WATER SUPPLY

15
16 At the present time, Olin is providing bottled water to well owners and tenants at 493
17 wells with perchlorate test results at or above 4 ppb (including 291 wells that meet the current
18 PHG and Action Level).² [McClure Decl., ¶ 11.] Olin's actual cost (January-July 2004) for
19 providing the alternative bottled water supply at the 493 wells exceeding 4 ppb is approximately
20 \$398,000. Olin's cost (August-December 2004) to provide the alternative bottled water supply at
21 the 275 wells below 4 ppb is estimated at \$158,000. Olin's projected bottled water cost for the
22 remainder of 2004 (August-December) for all 768 wells governed by the CAO is \$442,000.
23 Thus, Olin's estimated annualized cost to provide bottled water as required by the CAO is
24 \$1,060,000 (average \$115 per month per well) at the 4 ppb replacement water level (including
25 wells presently in the 2-4 ppb range requiring four consecutive quarters of confirmation

26
27 ² Olin is initiating bottled water, as required by the CAO, to the 275 additional wells below 4 ppb, until four
28 consecutive quarters of sampling confirm well perchlorate levels are below the 4 ppb CAO compliance
standard.

sampling). [McClure Decl., ¶ 11.] In contrast, Olin's projected off-Site replacement bottled water supply cost for wells exceeding 6 ppb (covering 202 wells in that category) would be \$279,000 per year. A chart comparing the number of wells and alternative water supply costs at the 2 ppb, 4 ppb and 6 ppb levels is set forth below. [McClure Decl., ¶ 11.]

| OFF-SITE REPLACEMENT WATER SUPPLY REQUIREMENTS | NO. OF WELLS | REPLACEMENT WATER SUPPLY PROJECTED COSTS |
|---|--------------|--|
| 2-3.99 ppb | 275 | Annualized cost: \$380,000/year |
| 4 -5.99 ppb | 493 | Annualized cost: \$402,000/year |
| 6 ppb and higher | 202 | Annualized cost: \$279,000/year |

As is apparent from the above chart, the Regional Board's refusal to accept the California PHG and Action Level significantly increases Olin's annual cost of providing replacement water by a minimum of \$402,000 per year (excluding the bottled water cost for wells below 4 ppb, subject to the CAO's four consecutive quarterly sampling confirmation requirement). Adding in the wells presently below 4 ppb (estimated \$380,000/yr.), Olin's additional bottled water costs under the CAO increase to approximately \$782,000 per year more than at the 6 ppb level, while providing no significant health benefit, since a 6 ppb standard is completely protective of human health, including all sensitive populations, as determined by California's OEHHA and DHS. [McClure Decl., ¶ 12.] Thus, to require Olin to continue to replace, with bottled water, safe well drinking water which already meets the conservative drinking water PHG and Action Level is unreasonable. With no reasonable factual or legal basis, such a requirement is an abuse of discretion.

Additionally, the CAO's Long Term Replacement Water Requirements will require Olin to spend (depending on the chosen feasible technology) an estimated \$3.6 million to \$4.1 million to implement long term and permanent well water treatment for wells between 4 ppb and 6 ppb even though such is expected to be unnecessary when the final California MCL and GW Aquifer Cleanup Standard (expected to be 6 ppb or higher) is determined in the near future. [McClure Decl., ¶ 13.] The May 2004 San Francisco Regional Board UTC Order setting a perchlorate GW

1 Aquifer Cleanup Standard of 6 ppb pending issuance of the MCL supports this contention. [UTC
2 Order, attached as Exh. M to Compendium of Orders submitted concurrently herewith.]

3 Olin's representatives authorized to receive notice are:

4 For Olin Corporation:

5 Curt M. Richards
6 Vice President
7 Olin Corporation
8 P. O. Box 248
9 Charleston, TN 37310-0248
10 Tel.: 423.336.4007/Fax: 423.336.4166
11 E-mail: cmrichards@olin.com

12 And

13 Randolph C. Visser
14 Morgan, Lewis & Bockius LLP
15 300 S. Grand Avenue, 22nd Floor
16 Los Angeles, CA 90071-3132
17 Tel.: 213.612.2500/Fax: 213.612.2501
18 E-mail: rvisser@morganlewis.com

19 **D. ACTION TO BE REVIEWED**

20 The action to be reviewed is the Regional Board's July 6, 2004 CAO imposing Interim
21 and Long Term Replacement Water Requirements on Olin. [Visser Decl., Exh. A, pp. 1-11.] In
22 particular, Olin requests review of the following CAO requirements:

23 1. Provision of interim replacement water: (a) at a 4 ppb replacement water compliance
24 level; and, (b) down to a 2 ppb confirmation level, rather than the current PHG/Action Level of
25 6 ppb (CAO, ¶¶ 1&2); and,

26 2. Provision of long term replacement water at 4 ppb (a) prior to the Regional Board's
27 setting of a GW Aquifer Cleanup Standard and California's MCL decision when it is unnecessary
28 and unreasonable to do so, as long as Olin continues to supply interim bottled water; and (b) prior
to the Regional Board's requesting a Water Replacement Plan in the CAO (CAO, ¶¶ 3-5).

29 **E. RELIEF AND STATE BOARD ACTION REQUESTED**

30 Olin requests the State Board direct the Regional Board to:

31 (1) revise or modify its CAO's Interim Replacement Water Requirements (CAO, ¶¶ 1&2)
32 to conform to the current perchlorate Action Level and PHG of 6 ppb, thus, requiring Olin to

1 supply alternative bottled water to domestic well owners only at wells above 6 ppb perchlorate
2 concentrations;

3 (2) vacate its CAO's Long Term Replacement Water Requirements (CAO, ¶¶ 3-5) until a
4 final perchlorate GW Aquifer Cleanup Standard and MCL are set, conditioned upon Olin
5 continuing to supply interim replacement water at the PHG/Action Level of 6 ppb until that time;
6 or,

7 (3) vacate the Regional Board CAO in its entirety for failure to request a Water
8 Replacement Plan as required by Water Code § 13304.

9 Alternatively, Olin requests the State Board directly provide the requested relief and
10 modify the CAO as set forth above, or vacate the CAO in its entirety.

11 **F. DATE OF ACTION**

12 The Regional Board issued its CAO on July 6, 2004 which Olin petitions to have
13 reviewed. [Visser Decl., Exh. A, pp. 1-11.]

14 **G. THE REGIONAL BOARD ABUSED ITS DISCRETION: ITS ACTIONS ARE
INAPPROPRIATE AND IMPROPER**

15 The Regional Board abused its discretion, acting inappropriately and improperly by
16 issuing the CAO imposing both Interim and Long Term Replacement Water Requirements on
17 Olin. The Regional Board's CAO raises substantial and significant precedential issues of
18 statewide importance for review concerning management and implementation of perchlorate
19 alternative water and remediation requirements governed by Water Code § 13304 and existing
20 State Board and Regional Board cleanup and abatement policies, including State Board
21 Resolution ("Res.") No. 92-49 (as yet not amended to conform to the new Water Code
22 replacement water requirements).

23 First, by the CAO, the Regional Board abused its discretion as there is no reasonable
24 factual basis or substantial evidence in the record to support its Interim and Long Term
25 Replacement Water Requirements which require Olin to supply replacement water below a 6 ppb
26 perchlorate level. By doing so, the Regional Board unnecessarily substituted its unsupported and
27 subjective judgment for California's controlling perchlorate drinking water 6 ppb PHG and
28 Action Level decisions. The current PHG and Action Level are a more conservative and health

1 protective interim standard for drinking water than even an enforceable MCL, as they exclude
2 consideration of economic and technical feasibility factors. In fact, OEHHA recognizes that even
3 concentrations above the PHG may be safe for lifetime consumption. In its original October 18,
4 2002 Order, the Regional Board deferred to, adopted and incorporated into its Order the DHS
5 Action Level as the perchlorate concentration at which Olin was to provide alternative water.
6 Once the DHS formally issued a revised 6 ppb Action Level to conform to OEHHA's 6 ppb PHG,
7 the Regional Board lacked any discretion or reasonable factual basis to require Olin to provide
8 alternative water for wells with drinking water concentrations of perchlorate less than 6 ppb. The
9 Regional Board provided no new or independent basis for maintaining 4 ppb (and below) as the
10 standard for requiring replacement water rather than the current 6 ppb Action Level and PHG. In
11 light of the California PHG and Action Level, there is neither a reasonable basis nor substantial
12 evidence to support the Regional Board's requirements that Olin replace safe well water that is at
13 or below California's Action Level and PHG of 6 ppb with alternative bottled water.

14 Second, the Regional Board abused its discretion as it is unreasonable and premature for
15 the Regional Board to impose the CAO's Long Term Replacement Water Requirements prior to
16 setting the necessary GW Aquifer Cleanup Standard and prior to California's decision on a final
17 perchlorate MCL, both of which will necessarily impact or "drive" the long term replacement
18 water standard and final GW Aquifer remediation. The Regional Board CAO preempts the
19 necessary, requisite and governing "phased" approach to and "progressive sequence" of cleanup
20 and abatement procedures, i.e., GW Aquifer investigation and characterization, remedial
21 investigation and feasibility and risk assessment studies, RAP and actual remediation, required by
22 law (including State Board Res. No. 92-49) and prejudices the final GW Aquifer Cleanup
23 Standard without allowing Olin to develop and submit evidence to demonstrate that a higher
24 alternative cleanup standard above background is appropriate. The Long Term Replacement
25 Water Requirements remain unnecessary as long as Olin continues to supply interim replacement
26 water until RAP completion and implementation. The San Francisco Regional Board's May 2004
27 UTC Order setting a 6 ppb perchlorate GW Aquifer Cleanup Standard based upon California's
28 perchlorate PHG and Action Level is a case in point. To require expensive, long term

1 replacement water and permanent well treatment at the 4 ppb level when the final GW Cleanup
2 Standard will be no lower than 6 ppb and could well be higher – depending on Olin’s RAP
3 submittal and the final MCL – makes no sense. By doing so, the Regional Board failed to
4 proceed in the manner required by law.

5 Third, the Regional Board abused its discretion failing to request a Water Replacement
6 Plan as statutorily required by newly-amended Water Code § 13304 for replacement water
7 requirements beyond 30 days, which must then be approved prior to implementation. The CAO’s
8 Interim and Long Term Replacement Water Requirements require Olin to supply replacement
9 water beyond 30 days. Thus, the Regional Board failed to proceed as required by law.

10 H. MANNER IN WHICH OLIN HAS BEEN AGGRIEVED

11 Olin has been aggrieved by the Regional Board’s July 6, 2004 CAO which does not
12 conform the CAO’s Interim and Long Term Replacement Water Requirements to California’s
13 6 ppb perchlorate PHG and Action Level, the standards the Regional Board itself adopted and
14 deemed “safe to people ingesting that water on a daily basis.” The Regional Board’s CAO results
15 in Olin being required to spend almost \$800,000 more each year for bottled water than it would
16 be required to spend for bottled water using the current 6 ppb PHG and Action Level standard.

17 In addition, Olin has been aggrieved by the Regional Board’s CAO’s Long Term
18 Replacement Water Requirements obligating Olin to supply long term replacement water at the
19 4 ppb level by implementing long term and permanent well treatment:

20 (1) prior to the Regional Board’s consideration and decision on a GW Aquifer
21 Cleanup Standard providing Olin the requisite opportunity to complete the State Board
22 Res. No. 92-49 sanctioned “phased approach” to GW investigation, cleanup and
23 abatement, and to develop and present evidence that a higher-than-backyard alternative
24 cleanup standard is appropriate as required by State Board Res. No. 92-49; and,

25 (2) prior to California’s setting of the final perchlorate MCL.

26 The Regional Board’s Long Term Replacement Water Requirements will force Olin to spend an
27 estimated \$3.6-4.1 million for long term well treatment technology to be implemented at wells
28 between 4 ppb and 6 ppb which will prove costly and likely unnecessary when a final MCL and

1 GW Aquifer Cleanup Standard at 6 or above is set (as the San Francisco Regional Board has
2 already done in the May 2004 UTC Order).

3 **I. STATEMENT OF POINTS AND AUTHORITIES**

4 A statement of points and authorities is filed with this Petition.

5 **J. COPY OF PETITION SENT TO REGIONAL BOARD**

6 A copy of this Petition has been sent to the Regional Board.

7 **K. STATEMENT CONCERNING SUBSTANTIVE ISSUES AND OBJECTIONS**

8 The substantive issues and objections raised in this Petition were raised before the
9 Regional Board in correspondence, discussions and at a meeting with the Regional Board staff on
10 May 18, 2004, as well as in the prior petition Olin filed with the State Board on May 28, 2004.

11 **L. REQUEST FOR HEARING (ORAL ARGUMENT) AND LEAVE TO PRESENT**
12 **SUPPLEMENTAL EVIDENCE (EXPERT OPINION AND PUBLIC DOCUMENTS)**

13 Olin requests that the State Board: (1) grant a hearing; and, (2) grant leave to present
14 supplemental evidence pursuant to 23 C.C.R. §§ 2050.6 & 2052(c). The Regional Board did not
15 provide Olin a formal hearing prior to issuance of the CAO.

16 Olin requests the hearing solely for oral argument of the issues presented in Olin's
17 Petition. Olin requests leave to present supplemental evidence in the nature of an expert opinion
18 declaration and public documents as further described below.

19 Olin requests the State Board to consider and admit evidence in the form of noted
20 toxicologist Dr. Richard D. Pleus' expert opinion as set forth in his declaration filed concurrently
21 herewith. In its CAO, the Regional Board based its Interim and Long Term Replacement Water
22 Requirements at the 4 ppb level (not 6 ppb PHG and Action Level) on certain draft EPA
23 perchlorate reference dose studies and guidelines. In his declaration, Dr. Pleus provides his
24 expert opinion on the validity and scientific merit of the Regional Board's use of those draft
25 studies to support its adoption of the 4 ppb replacement water level. Dr. Pleus details in his
26 Declaration the basis for his overall conclusion that the Regional Board made "a significant
27 number of scientific errors and misstatements of fact" regarding the EPA studies which
28 undermine the foundational basis for the Regional Board's CAO and its 4 ppb replacement water

1 level. Dr. Pleus' opinion, as presented in his Declaration, is relevant to Olin's contentions that
2 the Regional Board lacked a reasonable basis to adopt the 4 ppb replacement water level over
3 California's 6 ppb perchlorate and Action Level and that its use and reliance upon the EPA
4 studies is misplaced in fact, science and law. The Regional Board raised the draft studies for the
5 first time in its CAO. Thus, this is the first opportunity Olin has had to provide evidence that the
6 Regional Board's use and reliance upon the draft EPA studies are misplaced.

7 Olin also submits concurrently herewith a request for judicial notice for certain California
8 regulatory documents pertaining to California's actions in issuing and adopting the perchlorate
9 6 ppb PHG and revised Action Level and the EPA and Massachusetts reference dose documents
10 relied upon by the Regional Board as a basis for its CAO as further supplemental evidence
11 supporting its contentions.

12 In summary, for the aforesaid reasons, Olin requests the State Board to accept into the
13 record Dr. Pleus' declaration and the aforescribed public documents and that the State Board
14 grant a hearing solely for purposes of oral argument on the issues presented in Olin's Petition.

15 **M. REQUEST FOR AN IMMEDIATE STAY**

16 In accordance with 23 C.C.R. § 2053, Olin requests the State Board to stay: (1) the effect
17 of the CAO and both its Interim and Long Term Replacement Water Requirements; or,
18 alternatively, (2) the effect of CAO's Long Term Replacement Water Requirements alone,
19 pending a hearing by the State Board.

20 A stay is appropriate on the grounds that:

21 (1) Olin will be substantially harmed if a stay is not granted (as detailed in Section
22 III.C. & H. above);

23 (2) other interested parties and the public interest will not be substantially harmed if a
24 stay is granted, as Olin agrees to provide interim bottled water according to the 6 ppb
25 PHG and Action Level or as otherwise determined by the State Board; and,

26 (3) substantial questions of fact and law (and, of a precedential nature) exist regarding
27 the Regional Board's action in issuance of the CAO, as to: (a) the basis, timeliness and
28 reasonableness of its perchlorate Interim and Long Term Water Replacement

1 Requirements (as detailed in Section I above); (b) the developing conflicts and
2 inconsistencies in regional board management of perchlorate cleanup and abatement cases
3 (including at the UTC site) across the State of California; and, (c) the requirements,
4 appropriate interpretation and procedural application of the new Water Code § 13304
5 replacement water (including Replacement Water Plan) requirements.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Olin requests the State Board to direct the Regional Board to
8 or, directly itself, grant Olin its requested relief herein
9

10 Dated: August 2, 2004

Respectfully submitted,

11 MORGAN, LEWIS & BOCKIUS LLP
12 RANDOLPH C. VISSER
13 MARTIN "KELLY" J. McTIGUE

14 By 
15

Randolph C. Visser

16 Attorneys for Petitioner
17 OLIN CORPORATION
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